NO. Supreme Court, U.S.
FILED

941165 DEC 30 1994

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STANISLAW R. BURZYNSKI, M.D., Ph.D.

Petitioner

vs.

TRUSTEES OF THE NORTHWEST LAUNDRY AND DRY CLEANERS HEALTH & WELFARE TRUST

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Based on principles of comity, federalism and abstention, was it appropriate for the Fifth Circuit to affirm summary judgment for fraud and hold that Dr. Burzynski's treatment was illegal, while there was a pending state administrative proceeding dealing with that issue, and despite the fact that a Texas state administrative judge found to the contrary?

Specifically, in March, 1994, an Texas state administrative law judge held that under Texas law, it is and always was legal for Petitioner, Dr. Stanislaw R. Burzynski to treat his patients with the medicine which he manufactures, notwithstanding the fact that it is not approved by the FDA.

In July 1994, a panel of the Fifth Circuit affirmed summary judgment for fraud against the Petitioner on the grounds that he knew or should have known that his treatment was illegal in the State of Texas, and thereby defrauded the Respondent by not indicating on insurance claims forms that the treatment is illegal. The panel specifically held that the treatment is illegal in Texas, opined that the state administrative law judge's decision was incorrect, and suggested that the Texas State Board of Medical Examiners (the "Board") overturn the judge's decision and discipline the Petitioner.

In September 1994, the Board overturned the decision of its administrative law judge, largely because of the circuit court's decision.

In November 1994, a Texas State District Court Judge issued a Temporary Injunction prohibiting the enforcement of the Board's order finding there was a probability of success on the merits on Dr. Burzynski's appeal of the Board's decision adopting the Fifth Circuit's holding.

2. By relying on a theory of fraud that was never addressed by the parties or the district to affirm summary judgment, did the circuit court so far depart from the usual course of judicial proceedings so as to warrant this Court's review?

Specifically, the Fifth Circuit affirmed summary judgment for fraud, because Petitioner knew or should have known that his treatment was illegal in Texas, and his failure to so advise the Respondent was fraudulent because he had a duty to disclose this omitted fact based on the "confidential relationship" between the parties. However, the Respondent never alleged in its complaint that it had a confidential relationship with the Petitioner, nor did it offer any evidence of such on summary judgment. Respondent never alleged in the complaint that there was fraud by omission. The district court held that there were no fraud by omission, and never considered whether the parties had a confidential

relationship, because it was not raised by the parties. The parties did not brief the issue on appeal. The first and only reference to a confidential relationship between the parties is contained in the circuit court's decision.

3. The circuit court affirmed summary judgment on an ERISA claim different from the claim set forth in the complaint, argued by the Petitioner and decided by the district court. Neither the parties nor the district court ever addressed the claim sustained by the circuit court. Has the circuit court so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision?

4. Based on the foregoing, does the decision of the circuit and district court deprive Petitioner of his right to due process?

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PRIOR AND RELATED DECISIONS

- Order denying Petition for Rehearing and Suggestion for Rehearing en Banc dated October 4, 1994. (Appendix at Exhibit "A")
- Fifth Circuit decision affirming the district court dated July 28, 1994. (Exhibit "B")
- Order of the United States District Court for the Southern District of Texas denying Petitioner's Motion to Reargue dated December 11, 1992. (Exhibit "C")
- Summary Judgment Order and Final Judgment by the United States District Court for the Southern District of Texas on October 15, 1992, (Exhibit "D")
- Decision of Administrative Law Judge Earl A. Corbitt dated March 10, 1994. (Exhibit "E")
- Decision of the Texas State Board of Medical Examiners filed September 6, 1994 (Exhibit "F")
- Temporary Injunction Order issued by the Travis County District Court dated November 10, 1994 (Exhibit "G").

STATEMENT OF JURISDICTION

This petition for certiorari is filed under Rule 10.1(a) of the Rules of the Supreme Court insofar as the decision and result of the circuit court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Fifth Amendment

No person shall be . . . deprived of life, liberty or property without due process of law.

Section 5.09(a) of the Texas Medical Practice Act, Vernon's Ann. Civ. St. art. 4495b Section 5.09:

> A physician licensed to practice medicine under this Act may supply patients with any drugs, remedies, or clinical supplies as are necessary to meet the patients' immediate needs. This subsection does not permit the physician to operate a retail pharmacy without first complying with her Texas Retail Pharmacy Act. (citation omitted)

Section 431.114 of the Texas Food Drug and Cosmetics Act, V.T.C.A., Health & Safety Code Section 431.114 provides

that:

(a) A person shall not sell, deliver, offer for sale, hold for sale or give away any new drug unless:

(1) an application with respect thereto has been approved and the approval has not been withdrawn under Section 505 of the federal Act; and

(2) a copy of the letter of approval or approvability issued by the Federal Food and Drug Administration is on file with the commissioner if the product is manufactured in this state.

(b) A person shall not use in or on human beings or animals a new drug or new animal drug limited to investigational use unless the person has filed with the Federal Food and Drug Administration a completed and signed "Notice of claimed investigational exemption for a new drug" form in accordance with 21 C.F.R. 312.1 (1980) and the exemption has not been terminated. The drug shall be plainly labeled in compliance with Section 505(i) or 507(d) of the federal Act.

(c) This section shall not apply:

(1) to any drug that is not a new drug as defined in the federal Act:

(2) to any drug that is licensed under the Public Health Services Act of July 1, 1944 (42 U.S.C. 201 et seq.); or

(3) to any drug approved by the commissioner under the authority of any prior law.

STATEMENT OF FACTS

Petitioner, Dr. Stanislaw R. Burzynski is a medical doctor and holds a Ph.D. in biochemistry. Dr. Burzynski developed a cancer treatment which is not yet approved for interstate marketing by the Federal Food and Drug Administration, though it is currently approved by the FDA for testing and has been found to be effective in cancer patients by numerous scientists including those from the National Cancer Institute (See discussion in Administrative Law Judge Earl Corbitt's decision attached as Exhibit "E").

Respondent, the Northwest Laundry Trust is a pension plan which paid for Dr. Burzynski's medical treatment for one of its insureds, Huey Roberts. After paying for the treatment, Respondent sought partial reimbursement from its stop-loss insurance carrier. The carrier refused to pay, primarily on grounds that the treatment was allegedly illegal in Texas. Respondent then sued Dr. Burzynski claiming that he defrauded it into paying for the treatment by failing to disclose that the treatment was illegal in Texas.

Both sides were ordered by the district court to move for

summary judgment. At Respondent's urging, the district court ruled that Dr. Burzynski was on notice that the treatment was illegal in Texas, and stated that the treatment was illegal.

On reargument, Petitioner, inter alia, asked the district court to vacate its ruling and abstain from ruling on the state law issue, since the issue of the legality of the treatment was then pending in two state court proceedings. The motion for reargument was denied.

After briefs were submitted on Petitioner's appeal to the Fifth Circuit, one of the state court cases dealing with the legality of the treatment went to hearing.

Oral argument on the appeal in this case was held in February 1994. By decision dated March 10, 1994, the Texas state administrative law judge ruled in Dr. Burzynski's favor, and specifically held that under Section 5.09 of the Texas Medical Practices Act, it is legal for Dr. Burzynski to use his treatment on patients in Texas.

In part, the administrative law judge's decision was based on evidence adduced at trial that in 1977, the former head of the State Food and Drug Division of the Department of Health, and the former general counsel of the Department Health advised Dr. Burzynski's attorneys (retained to determine if it would be legal for him to treat patients with unapproved drugs he manufactured) that the new drug section of the Texas Food Drug and Cosmetics

Act did not apply to a physician manufacturing drugs for his own patients.

Petitioner then moved to supplement the record in this case with the administrative law judge's decision. In its motion, Petitioner urged the circuit court not to make a determination on Texas law, either to agree or disagree with the state administrative law judge's finding. Rather, Petitioner argued that the fact that the state judge agreed with Dr. Burzynski's interpretation of Texas law surely meant that he could not, for summary judgment purposes, be held to have "known or should have known" that his treatment was illegal in Texas. Petitioner argued that even if the panel disagreed with the state judge's ruling, that judge's decision surely should be enough to defeat a summary determination that as a matter of law Dr. Burzynski could not have held a reasonable belief that his treatment was legal in Texas.

The Fifth Circuit granted Petitioner's motion to supplement the record. However, it rejected his request that the court refrain from construing Texas law. Instead the circuit court upheld the lower court's finding that the treatment is illegal in Texas, summarily rejected the administrative law judge's decision, and suggested that the Board discipline Petitioner.

Subsequent to the Fifth Circuit's decision, the Board met and decided to reject all of the administrative law judge's

conclusions which conflicted with the district and circuit court decisions in this case. The Board accepted the administrative law judge's findings and conclusions of law on those matters not decided by the federal courts.

By order dated October 4, 1994, Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc was denied.

In October 1994, Petitioner filed an action for judicial review of the Board's decision in state court. On November 10, 1994, a State District Court Judge issued a Temporary Injunction prohibiting the Board from enforcing its decision, finding that Dr. Burzynski proved a probability of success on the merits of his appeal of the Board's decision, which adopted the Fifth Circuit's result regarding the legality of the treatment.

BASIS OF FEDERAL JURISDICTION

Respondent/Plaintiff filed this action in federal court by asserting a claim under the federal racketeering act, with a pendant state claim for fraud. Subsequently the complaint was amended to assert an ERISA claim.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION DISRUPTS THE PENDING STATE PROCEEDING AND PREJUDICES PETITIONER'S RIGHT TO DUE PROCESS

The circuit court's decision is an unnecessary and highly prejudicial intrusion in to a complicated state proceeding which has already lasted six years. The circuit court's decision makes the federal court in effect an adversary in Petitioner's state court proceeding. Rather than render a decision on state law, the circuit court should have abstained, either originally or on rehearing. In an analogous procedural setting, the Fourth Circuit in *Nature Conservancy vs. Machipongo Club, Inc.*, 579 F.2d 873 (4th Cir.), *cert. den.* 439 U.S. 1047 (1978) abstained at en banc rehearing, from deciding a state law issue then pending before a state court. If abstention was warranted in *Nature Conservancy*, a fortiori it was warranted in this case since in deciding the Texas law issue as it did, the Fifth Circuit rejected the recent decision of the state administrative law judge in an on going administrative case.

Principles underlying three kinds of abstention suggest that the circuit court and the district court should have refrained from the deciding the state law issue until that issue was resolved by the state courts.

Since this lawsuit case did not attempt to stop an

ongoing state proceeding based on a constitutional challenge, abstention under *Younger* is not technically applicable. However, *Younger* teaches us that federal courts should normally refrain from interfering with ongoing state proceedings. The *Younger* doctrine is designed to permit state courts and agencies to try state cases free from interference by federal courts. *Hicks v. Miranda*, 422 U.S. 332, 45 L.E.2d 223, 95 S.Ct. 2281 (1975). Under *Pullman*, federal courts abstain when presented with a federal constitutional question concerning the validity of state law where there is a possibility that the state court may interpret the challenged state law to eliminate or alter the constitutional question raised in federal court. *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496 85 L.E. 971, 61 S.Ct. 643 (1941). Technically the *Pullman* doctrine is not applicable to this case. However, the its rationale may be. In a proper circumstance, a federal court should stay a case to provide the state court an opportunity to settle an underlying state law question, in order to avoid unnecessary friction in federal-state relations and to limit the federal court's interference with important state functions. *Growe v. Emison*, 122 L.E.2d 388, 113 S.Ct. 1075 (1993). *Harris County Commrs. Court v. Moore*, 43 L.E.2d 32, 96 S.Ct. 870 (1975); *Harman v. Forssenius*, 380 U.S. 528 14 L.E.2d 50, 85 S.Ct. 1177 (1965).

Under *Burford* abstention, when a case involves a non-

constitutional federal issue, but its resolution rests on an underlying issue of state law, the federal court may abstain if there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar, or where federal review of a state question would be disruptive of state efforts to establish a coherent policy with respect to a matter substantial public concern. *New Orleans Public Service, Inc. v. Council of New Orleans*, 105 L.E.2d 298, 109 S.Ct. 2506 (1989).

Burford abstention usually deals with orders and regulations in state administrative actions. While abstention under *Burford* would not be technically applicable, the concerns which *Burford* mentions are relevant, and suggest that in this anomalous case, abstention was warranted.

It is the job of the Texas State Board of Medical Examiners, with the review of the Texas state courts, to determine whether a physician may use in Texas medications which he manufactures. Unfortunately the Board felt it was compelled by the decisions of the federal courts to reject the conclusions of the Texas administrative law judge. By issuing a Temporary Injunction, a Texas State District Judge has already indicated that the Board's decision which follows the federal courts was incorrect.

Both federal court decisions create unnecessary friction

between the federal and state courts. It was grossly inappropriate for the circuit court to summarily reject the administrative law judge's opinion and suggest that the Texas state agency take disciplinary action against a party to the federal appeal. Based on the circuit court's improper interference in the ongoing state action, Petitioner requests that the instant petition for certiorari be granted.

II. Anomalies in the Fifth Circuit's Decision Justifies Supreme Court Review

A. Fraud

The circuit court's decision as well as the district court's decision on summary judgment has so far departed from the accepted and usual course of judicial proceedings so as to deny Petitioner's right to due process and justifies this Court in exercising its power of supervision. This Court has on occasion accepted cases on certiorari involving the appropriateness of summary judgment for plaintiffs, *Public Employees Ret. Sys. of Ohio v. Betts* 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed. 134 (1989) or which involve an issue of state law. *Masson v. New Yorker Magizine, Inc.*, 111 S.Ct. 2419 (1991).

In the instant case, summary judgment for fraud was granted even though there was no evidence introduced about the circumstances surrounding the payment for the treatment. Thus,

there was no evidence that the claims were paid because of the alleged fraudulent representation. Indeed, the complaint never so alleged. Thus, there was no evidence (or allegation) of reasonable, detrimental reliance. Yet summary judgment was sustained.

The lower court on reargument held that the fraud judgment rested on one alleged affirmative misrepresentation of fact. The district court expressly declined to find that there was fraud by omission, or that there was a duty to disclose omitted facts.

The circuit panel affirmed the fraud result, but for different reasons, and based on different findings of fact. It upheld fraud because Petitioner knew or should have known that his treatment was illegal in Texas. The panel held that Dr. Burzynski's failure to so advice the Respondent was fraudulent because he had a duty to disclose based on the confidential relationship between the parties.

However, the Respondent never alleged in its complaint that it had a confidential relationship with the Petitioner. On the summary judgment motion, it submitted no evidence on this issue. The lower court never considered it. The parties never briefed or argued the issue to the circuit court. Thus, the first and only mention of the confidential relationship between the parties is in the panel's opinion. The rule of practice in circuit courts is that

the court of appeals will not consider an issue not raised in the lower court absent exceptional circumstances. *Re Texas Mortg. Services Corp.* 761 F.2d 1068 (5th Cir. 1985); *Re Grand Jury Proceedings*, 517 F.2d 666 (5th Cir. 1975) *reh. den.* 521 F.2d 815.

In any event, the panel's decision is inconsistent with every Texas case it cites in that all the cases hold that a confidential relationship must be proven at trial by detailed evidence. In one Texas case a widow needed a trial to prove a confidential relationship between herself and her step-father and uncle, and that she was too emotionally overwrought by the death of her husband to require compliance with the general rule that there is no duty to disclose facts. *Lang v. Lee*, 777 S.W.2d 158 (Tex. Civ. App. - Dallas 1989). Since there was no evidence in this case, the rule implicit in the panel's decision is that there is a confidential relationship between any party (or any health practitioner) supplying information to another who seeks payment from that party. This rule does not accurately reflect Texas law.

Surely an appellate court can affirm a result on different grounds. But in this case, there was no evidence, factual allegation or legal argument supporting the circuit court's decision on fraud. The panel's actions are therefore inappropriate and ultra vires.

B. ERISA

The panel's affirmance of the lower court's decision on the ERISA constitutes a similar departure from the normal and usual course of judicial proceedings. The panel upheld summary judgment on ERISA because the plan's language (albeit in another part of the plan) in effect excludes all non-FDA approved treatments such as Dr. Burzynski's. However, Respondent has never asserted that ERISA claim in this lawsuit, not in its complaint, nor on summary judgment, nor even on appeal![1] Rather, as set forth in its Second Amended Complaint, Respondent claimed that its insured was not obligated to pay for the treatment because it was illegal in Texas, and hence the Respondent was not obligated to pay for it. (Second Amended

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Respondent never asserted the ERISA claim affirmed by the circuit court panel probably because it had previously decided that the treatment was a covered expense despite its lack of FDA approval. In a letter to the stop loss carrier the Trust's attorney stated:

"The Cost Containment [provision used by this panel to affirm the ERISA claim] applies only to treatment as an in-patient in a hospital and further is only optional to the participant if the participant desires to have pre-authorization for his hospitalization and thus received greater benefits. Huey Roberts was not an in-patient and thus this 2
portion of the Plan is not applicable. The "medically necessary" definitions in that part of the Plan are not applicable to the general plan for the payment of covered services. (emphasis added).

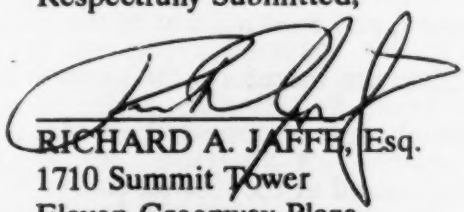
Complaint attached as Exhibit "H" at pages 12 para. 44 to page 13 para. 48.) Either the panel affirmed a claim not contained in the complaint, or it affirmed a claim based on an argument never argued or briefed by the parties, not considered by the lower court, and contradicted by the Respondent's own counsel. At a minimum therefore, the panel's decision is a departure for the usual court of appeals' rule that it does not consider arguments not raised at the district court.

The panel's departure from the accepted and usual course of judicial proceedings on the ERISA issue, and the fraud issue is even more unusual since neither of the parties even raised these issues on appeal! These legal constructs are completely the invention of the circuit panel. It is respectfully submitted that however broadly the powers of the circuit court may be construed, they cannot include the power to create theories of recovery and causes of action not asserted by the parties and then award judgment as a matter of law, without the benefit of the parties addressing these claims. The fact that the panel summarily rejected a decision of a Texas State Administrative law judge to reach its result should certainly elevate the panel's departure to warrant review by this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully suggests that the instant petition for certiorari be granted.

Respectfully Submitted,



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